UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Service Oil, Inc.,	)	**Docket No. CWA-08-2005-0010**
	)	
Respondent	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTIES

I. Procedural Background

The Complaint in this matter was filed on April 26, 2005 by the United States Environmental Protection Agency, Region 8, under Section 309 of the Clean Water Act (CWA). It alleges in Count 1 that Respondent violated Section 301(a) of the CWA and its implementing regulations, by failing to obtain, on or before the date it commenced construction activities at its facility, a North Dakota Pollutant Discharge Elimination System (NDPDES) permit authorizing storm water discharges from its facility. The Complaint alleges in Count 2 that, after Respondent obtained a permit, it failed to conduct storm water inspections at the frequency required by the permit, and/or to maintain inspection records on-site. The penalty proposed in the Complaint for the two alleged violations is $80,000.

In its Answer, Respondent admitted the alleged violations, but contested the amount of the proposed penalty and requested a hearing. After an unsuccessful effort to resolve this matter by Alternative Dispute Resolution, the undersigned was designated on August 31, 2005 to preside in this matter. Thereafter, pursuant to a Prehearing Order, the parties filed prehearing exchanges. Several motions were filed by the parties, some of which have been ruled upon and others of which were deferred for ruling until after issuance of the present Order. The subject of this Order is Complainant's Motion for Accelerated Decision on Liability and Penalties, filed on November 23, 2005 (Motion). Respondent submitted a Brief in Opposition to the Motion on January 5, 2006, and Complainant filed a Reply thereto on January 19, 2006. The parties filed a Joint Set of Stipulated Facts, Exhibits and Testimony ("Stip") on December 1, 2005.

II. Undisputed Facts As to Liability

Respondent, a North Dakota corporation, as of April 2002 owned and/or was engaged in construction activities at a facility known as the Stamart Travel Center in Fargo, North Dakota. Complaint and Answer ¶ 19; Stip ¶ 14. Pursuant to Section 402(p) of the CWA, EPA

promulgated regulations at 40 C.F.R. Part 122.26, requiring permits for discharges of storm water associated with industrial activities and from municipal storm sewers into "waters of the United States." See, 40 C.F.R. §§ 122.26(a), 122.26(b)(8), 122.26(c). The City of Fargo's municipal separate storm water system located at Respondent's construction site ultimately discharges into the Red River of the North, which is one of the "waters of the United States." Complaint and Answer ¶¶ 24, 25; Stip ¶¶ 19, 20. The construction activities at the Stamart Travel Center disturbed over five acres, which brought it within the definition of an "industrial activity" under 40 C.F.R. § 122.26(b)(14)(x). Complaint and Answer ¶ 20, 28; Stip ¶ 15. Dischargers of storm water associated with industrial activity are required to apply for a National Pollution Discharge Elimination System (NPDES) permit or seek coverage under a promulgated storm water general permit. CWA § 402(p), 33 U.S.C. § 1342(p); 40 C.F.R.. § 122.26(c). North Dakota issued a general NPDES permit, No. NDR03-0000, effective October 1, 1999, authorizing storm water discharges associated with construction activities, if done in compliance with the permit. Complaint and Answer ¶ 15; Stip ¶ 10.

On October 24, 2002, an EPA inspection was conducted at Respondent's facility to determine compliance with the CWA and its implementing regulations. Complaint and Answer ¶ 29; Stip ¶ 24. As of October 24, 2002, Respondent had not received an NPDES permit nor a NDPDES permit authorizing storm water discharges from the facility. Complaint ¶¶ 30, 39; Stip ¶¶ 25, 34. As of October 24, 2002, Respondent had not met the requirements for compliance with an NPDES permit, such as having a storm water pollution prevention plan, a program for installing and maintaining Best Management Practices (BMPs), and a program for inspecting BMPs to minimize environmental impacts from storm water discharges, and recording and maintaining records of inspections. Complaint and Answer ¶¶ 32, 33; Stip ¶¶ 27, 28.

In a letter dated November 15, 2002, Respondent was granted coverage under the NDPDES General Permit No. NDR03-0571 from the State of North Dakota Department of Health. Complaint and Answer ¶ 34, Stip ¶ 29. The permit requires that inspections be performed at least once every seven calendar days and within 24 hours after any storm event of greater than 0.5 inches of rain per 24-hour period, that inspection results be summarized and recorded on a Site Inspection Record, and that the Site Inspection Records be maintained on-site. Complaint and Answer ¶¶ 25, 37; Stip ¶ 30, 32. Respondent failed to conduct the inspections every seven calendar days and within 24 hours after any storm event of greater than 0.5 inches of rain per 24-hour period. Respondent failed to record and/or maintain on-site Site Inspection Records of weekly inspections. Complaint and Answer ¶ 38; Stip ¶ 36.

III. Arguments of the Parties Regarding Liability on Count 1

Complainant asserts that there are no genuine issues of material fact that Respondent failed to obtain a North Dakota NPDES permit to authorize storm water discharges from its facility, on or before construction commenced at the facility. Complainant points out that Section 301(a) of the CWA prohibits the discharge of any pollutant into waters of the United

States unless authorized by a permit, and that Respondent admitted in its Answer that "runoff and drainage from the Respondent's facility is storm water," that "[s]torm water, snow melt, surface drainage and runoff water flow from the Respondent's facility into the City of Fargo's municipal separate storm sewer system," and that "storm water runoff from Respondent's facility can result in the discharge of a pollutant" Complaint and Answer ¶¶ 21, 23; Answer ¶ 26. Complainant points to cases which note that pollutants which are conveyed through storm sewer systems into waters of the United States constitute a "discharge of a pollutant" within the meaning of the CWA. Complainant asserts that during the inspection, the inspector observed sediment and unprotected storm drains in the street bordering the construction site, and that Respondent admitted in its Prehearing Exchange (at 17) that sediment was tracked into the street bordering the facility. Complainant asserts that the covered storm drains at Respondent's facility possibly redirected drainage flow toward the unprotected storm drains near the facility. Motion at 11; Complainant's Prehearing Exchange Exhibits (C's Ex.) 14, 15, 23. Complainant refers to precipitation data presented as exhibits in its Prehearing Exchange, showing that from April through November 2002, the site received approximately 22.59 inches of precipitation, 91 percent of the total annual precipitation. Motion at 11.

Respondent in its Opposition asserts that Complainant has not established the elements of liability for Count 1. Based on the language of Section 301(a) of the CWA, that "Except as in compliance with [certain sections of the CWA requiring a permit], the discharge of any pollutant by any person shall be unlawful," Respondent states that the elements of liability are: (1) that the respondent has discharged pollutants into waters of the United States, and (2) that such discharge does not comply with a permit requirement. Citing to *State of Michigan v. City of Allen Park*, 501 F. Supp. 107, 1014 (D.C. Mich. 1980); *Bufford v. N.A. Williams,* 42 Fed. Appx. 279, 283 (10th Cir. 2002), Respondent argues that even if the respondent failed to obtain a permit, Complainant must prove that the respondent in fact discharged pollutants into waters of the United States. Respondent asserts that there are genuine issues of material fact as to whether pollutants were in fact discharged from Respondent's site into the municipal separate stormwater sewer system. Respondent states that it only admitted that sediment was tracked from the site onto the streets, and did not admit that sediment flowed from the site into the municipal sewer system. Respondent points out that it has proposed witnesses to testify that soil was removed from the site which created a bowl or depression in the soil, and that it has evidence that land in the area is very flat. Respondent argues that storm water runoff from the site therefore could only occur in a catastrophic rain event, that no such catastrophic event occurred in the Fargo area during the time at issue, and that an inference must be drawn that its site did not generate storm water runoff. Given the lack of evidence that sediment was in fact discharged from Respondent's facility, and the inference that must be drawn from Respondent's evidence, and viewing the evidence in light most favorable to Respondent as required under the standard for motions for accelerated decision, Respondent concludes that genuine issues of material fact remain as to whether there was a discharge of a pollutant from Respondent's site.

In addition, Respondent argues that there are genuine issues of material fact as to whether pollutants were in fact discharged from the Fargo municipal separate storm sewer into the Red River. Respondent admitted that sedimentary material from the facility could flow into the Red

River in the event of a catastrophic precipitation event. Complainant conceded that the sewer empties into a gravity pond or detention pond before draining into the Red River, and only suggested that sediment was discharged into the Red River. However, Complainant has not presented evidence that sedimentary particles from Respondent's facility "were actually identified and tracked from the facility through the municipal sewer and into the Red River, Respondent argues. An inference must be drawn from the existence and purpose of the detention pond that sediments from storm water runoff would settle to the bottom of the pond prior to the water flowing into the Red River. Because the evidence must be viewed in light most favorable to Respondent, and inferences drawn in its favor, Respondent concludes that genuine issues of material fact preclude granting the Complainant's Motion.

In its Reply, Complainant urges that Respondent's admissions as to liability bar any defense to liability which it now raises. Complainant asserts that it is well settled in case law that a discharge of a pollutant is not a predicate to a CWA violation so long as a permit has been violated, citing *San Francisco Baykeeper v. Tidewater Sand & Gravel Co.,* 46 ERC 1780, 1997 U.S. Dist LEXIS 22602 (N.D. Cal. 1997), *City of New York v, Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 903-04 (S.D.N.Y. 1995), and *Sierra Club v. Simkins Industries, Inc.*, 617 F. Supp. 1120 (D. Md. 1985), *aff'd*, 847 F.2d 1109 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989). Complainant argues that to establish liability, it must show only that a discharge of a pollutant to waters of the United States *can* occur, which it has done. Complainant asserts that the evidence shows that discharges *did* occur, including photographs from the inspection showing sediment that was not contained in the depression or bowl Respondent alleges was on the site. Reply at 5, 6; C's Ex. 1(A) though (T). Complainant asserts that if there was precipitation during the relevant time period, "there is the likelihood that unprotected storm drains will receive storm water runoff in some fashion," which "can occur from trucks and heavy equipment driving in and out of a construction site and leaving tracks from the site in the eye of the storm drain, as occurred in the instant case." Reply at 7.

Complainant asserts that Respondent did not present any evidence or qualified witnesses to testify as to the engineering of the site, to show that storm water could not run off the site, or to show the use of the detention pond into which the municipal sewer drains prior to entering the Red River. Complainant states that its proposed witness will testify that the detention pond was designed for its primary use of flood control, and that the detention pond would need to be designed as a retention pond to be an adequate Best Management Practice.

IV. Standard for Accelerated Decision

The Rules of Practice, 40 C.F.R. Part 22 provide at section 22.20(a) that

> "The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law."

Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate guidance as to accelerated decision. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant,* 4 E.A.D. 772, 780-82, (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148.

First it must be determined whether, under FRCP 56(c), the movant has met its initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)). For the EPA to prevail on a motion for accelerated decision on liability, it must present "'evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it'" [and] "'must show that it has established the critical elements of [statutory] liability and that [the respondent] has failed to raise a genuine issue of material fact on its affirmative defense . . . .' " *Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) quoting *BWX Technologies, Inc.,* RCRA (3008) Appeal No. 97-5, 2000 EPA App. LEXIS 13 at *38-39, 43 (EAB, April 5, 2000). "Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion." *Rogers*, 275 F.3d at 1103. Inferences may be drawn from the evidence if they are "reasonably probable." *Id.* "Summary judgment is inappropriate when contradictory inferences can be drawn from the evidence." *Id.*

V. Discussion as to Liability for Count 1

A. Whether Complainant must establish an actual discharge

The statutory authority to issue the Complaint is Section 309(g)(1) of the CWA, which provides in pertinent part:

> Whenever on the basis of any information available —
> (A) the Administrator finds that any person has violated section 1311 . . . of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State . . . .
> * * *
> the Administrator . . . may . . . assess a . . . class II civil penalty under this subsection.

The Complaint alleges in Count 1 (at ¶ 40), and Respondent admits in its Answer and stipulates (Stip ¶ 35) that:

> The Respondent's failure to obtain a NDPDES permit on or before the date of commencement of construction activities at its facility and everyday thereafter until a permit is in place is a violation of sections 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p) and 40 C.F.R. § 122.26.

With such admission and stipulation on the part of Respondent, it would appear that there are no issues as to liability for Count 1. An admission of fact, that is, a judicial admission, may be binding on Respondent. However, the admission or stipulation that a failure to take a certain action constitutes a violation of a certain statutory or regulatory provision is an admission of, or stipulation to, a legal conclusion, which is not binding. *Hegeman-Harris & Co. V. United States,* 440 F.2d 1009, 1012 (Ct.Cl. 1971); *Swift v. Hocking Valley Railway*, 243 U.S. 281, 290 (1917); *Correia v. Fitzgerald*, 354 F.3d 47, 55 (1st Cir. 2003)(determinations as to a stipulation's meaning and legal effect are determinations of law). The Complaint having been filed under the authority of CWA Section 309(g), a determination must be made whether, as a matter of law, Respondent's admitted failure to obtain a permit constitutes a violation that is enforceable under Section 309(g).

In order to bring a complaint for administrative penalties under Section 309(g), the complaint must allege a violation of Section 301, a violation of "any permit condition or limitation implementing any of such sections in a permit issued under section 1342 [CWA 402] . . . or . . . section 1344 [CWA 404]," or a violation of Section 302, 306, 307, 308, 318, or 405 of the CWA. Count 1 does not allege a violation of these latter sections of the CWA, and does not allege that Respondent has violated a permit condition or limitation in a permit issued under Section 402.[1] Therefore, Complainant's allegations in Count 1 are only enforceable under Section 309(g) if they constitute a violation of Section 301.

The only relevant paragraph of Section 301 is paragraph 301(a), which provides, in pertinent part:

> Except as in compliance with this section and sections . . . 1342 . . . of this title, the discharge of any pollutant by any person shall be unlawful.

To interpret a statutory construction, a tribunal begins with the language of the statute, and if it has a plain and unambiguous meaning with regard to the dispute at issue, the inquiry ends. *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450 (2002). Where Congress' intent is clear from the plain language of the statute, that is the end of the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron USA Inc. V. Natural Resources Defense Council, Inc.* 467 U.s. 837, 842-43 (1984); *Microban Products Co.,* FIFRA App. No. 02-07, 2004 EPA App. LEXIS 13 * 54 (EAB, May 12, 2004)(The language of the Act itself is the primary consideration in interpreting any statute). The plain

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[1] Section 402(p) sets forth the authorization for the EPA Administrator to establish regulations setting forth the permit application requirements for stormwater discharges.

language of Section 301(a) states that, to be liable for a violation of Section 301(a) of the CWA, there must be a "discharge of any pollutant." The term "discharge of a pollutant" is defined in Section 502(12) of the CWA as "any addition of any pollutant to navigable waters from any point source." [2] An element of liability under Section 301(a) of the CWA is the occurrence of a "discharge of any pollutant" by Respondent. Thus, to prove a violation of Section 301(a), there must be proof of an actual discharge of a pollutant. Complainant's argument that it must show only that a discharge of a pollutant to waters of the United States *can* occur is not consistent with the language of Section 301(a).

Complainant's argument is also not supported by case law cited in its Reply. The cases cited by Complainant involved violations of a permit, or only addressed the amount of penalty, and are thus not relevant to alleged violations of CWA Section 301(a). *See, San Francisco Baykeeper v. Tidewater Sand & Gravel Co.,* 46 ERC 1780, 1997 U.S. Dist LEXIS 22602 (N.D. Cal. 1997)(noncompliance with a permit is a violation of the CWA); *City of New York v, Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 903-04 (S.D.N.Y. 1995)(citizen suit alleging violation of State's general permit condition that Notice of Intent and copy of a stormwater pollution prevention plan must be filed prior to commencement of construction); *Sierra Club v. Simkins Industries, Inc.*, 617 F. Supp. 1120 (D. Md. 1985), *aff'd*, 847 F.2d 1109 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989)(permit noncompliance); *United States v. Gulf Park Water Co.*, 14 F. Supp 2d 854 (S.D. Miss. 1998)(EPA need not quantify environmental harm in justifying substantial penalty; fact that violation posed potential harm may be sufficient); *In re Wallin*, 10 E.A.D. 18, 32 (EAB 2001)(penalty, not liability, at issue).

The language of the regulations at Section 122.26 cannot change the plain language of Section 301(a) requiring proof of an actual discharge. Section 122.26(c) provides, in pertinent part:

> Dischargers of stormwater associated with industrial activity . . . are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit . . . shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph.

In turn, 40 C.F.R. § 122.21(a) provides that "Any person who discharges or proposes to discharge pollutants" must submit an application in accordance with Section 122.21. The regulation provides at Section 122.21(c)(1) that:

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[2] The term is defined similarly in the regulations implementing Section 402 of the Act at 40 C.F.R. § 122.2, but in addition Section 122.2 states that the term "includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; [and] discharges through pipes, sewers, or other conveyances owned by a . . . municipality . . . ."

> Any person proposing a new discharge, shall submit an application at least 180 days before the date on which the discharge is to commence . . . . Facilities proposing a new discharge of stormwater associated with industrial activity shall submit an application 180 days before that facility commences industrial activity which may result in a discharge of storm water associated with that industrial activity. Facilities described under § 122.26(b)(14)(x) . . . shall submit applications at least 90 days before the date on which construction is to commence.

It is clear that the regulations set forth an affirmative obligation for persons who have not yet discharged stormwater to submit an application for a permit. The regulations at Section 122.21 make clear that the term "dischargers of stormwater" in Section 122.26(c) applies to those persons who have not yet discharged stormwater. Subparagraphs of Section 122.26(c) also clearly indicate that the "dischargers of stormwater" who required to apply for a permit include persons who have not yet discharged stormwater. For example, 40 C.F.R. § 122.26(c.)(1)(i) requires that "the operator of a storm water discharge associated with industrial activity subject to this section" provide certain information, and in subparagraph 122.26(c)(1)(i)(G) provides that "Operators of new sources or new discharges (as defined in § 122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters" listed in subparagraph (E). The terms "new discharger" and "new source" are defined in 40 C.F.R. § 122.2 as any building, structure, facility, or installation from which there is or may be a "discharge of pollutants." As another example, 40 C.F.R. § 122.26(c)(1)(ii) states that "An operator of an existing or new storm water discharge that is associated with industrial activity solely under (b)(14)(x) of this section . . . is exempt from the requirements of § 122.21(g)" and must submit certain listed narrative information instead. The regulations also suggest that a stormwater permit is required even where there is little potential for stormwater discharges. *See*, 40 C.F.R. § 122.26(b)(15)(EPA may waive requirements in a general permit for storm water discharge from small construction activities, less than five acres, where there is a low value of rainfall erosivity during the construction activity).

In sum, there is no dispute that Section 122.26(c) required Respondent to apply for a permit and that Respondent did not do so. However, it does not follow that a violation of the regulation, 40 C.F.R. § 122.26, for failure to apply for the permit, is also a violation of Section 301(a) of the CWA, where there is no proof of occurrence of an actual discharge. It is observed that a court has held that the failure of a Concentrated Animal Feeding Operation (CAFO) to have an NPDES permit is an independent violation of the CWA, even during periods of no discharge. *Water Keeper Alliance v. Smithfield Foods, Inc.*, 53 ERC 1506, 2001 US Dist LEXIS 21314 (E.D.N.C., Sept. 20, 2001). However, in that case, while the court held that plaintiffs stated a claim under the CWA for defendant's failure to apply for a permit, it did not cite to the section of the CWA under which a claim could be stated, and did not cite to any other authority in support. In promulgating CAFO regulations, including the duty to apply for a permit, EPA has noted arguments that there may be no statutory authority to require CAFOs to apply for permits where there is no discharge to waters of the United States, particularly considering that discharges from CAFOs are often intermittent and unplanned. Final Rule, NPDES Regulation,

Effluent Limitations, Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7201 (February 12, 2003); see, 40 C.F.R. 122.23(a)(CAFOs must apply for permit for discharges or potential discharges).

It may be that some provision listed in Section 309(g) of the CWA, other than Section 301, may provide a statutory basis for an administrative enforcement action for failure to apply for a stormwater permit as required by 40 C.F.R. § 122.26(c). Complainant, however, has not cited to any such provision. Accordingly, it is concluded that under the Complaint as written, Complainant must establish that a discharge occurred during the relevant period.

B. Whether Complainant established that there are no genuine issues of material fact that Respondent's facility discharged stormwater

As to whether Complainant has shown that a stormwater discharge did in fact occur, Respondent's admissions and stipulations are not sufficiently specific to establish that Respondent's facility in fact discharged stormwater at some time during the relevant period, from April through November 2002. Respondent's admissions that "runoff and drainage from the Respondent's facility is 'storm water,'" that "[s]torm water, snow melt, surface drainage and runoff water flows from the Respondent's facility into the City of Fargo's municipal separate storm sewer system," Complaint and Answer 21, 23; Answer ¶ 26; Stip ¶ 16, 18), and its stipulation that "storm water runoff from Respondent's facility is the "discharge of a pollutant" (Stip ¶ 21) do not refer to any time period. They could be construed as applying to any time period, such as after November 2002. For purposes of ruling on Complainant's Motion, they must be construed that way, in a light most favorable to Respondent, where Respondent contemporaneously asserts[3] that there was no stormwater discharge during the time period from construction until November 2002.

Complainant's proposed evidence showing that during the inspection, sediment and unprotected storm drains were observed in the streets bordering the site (C's Ex. 1), Respondent's admission that there was sediment tracked by trucks from the site onto the street (Respondent's Prehearing Exchange p. 17), Complainant's assertion that such sediment would flow to the city storm drains (Motion at 11; Penalty Justification, C's Ex. 23), its evidence that the storm drains on the site were covered (C's Ex. 14, 15), and its precipitation data (C's Ex. 13), suggest, or provide a foundation for an inference, that there was a stormwater discharge from the facility during the time from April through November 2002.

The next question is whether Respondent's proposed testimony and evidence are sufficient to raise a genuine issue of material fact as to a discharge. Respondent's proposed expert witness Mr. Lunde is expected to testify about drainage in the Red River Valley, and

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[3] The stipulations were filed on December 1, 2005, and Respondent's Opposition was submitted January 5, 2006.

drainage from the facility. Respondent's Prehearing Exchange at 1. Respondent did not supply any affidavit or expert report of Mr. Lunde. Respondent did not name any other witnesses or any evidence to support its assertion that soil was removed from the site, creating a bowl or pond on the site. Opposition at 9, 21. Respondent's proposed exhibits include a topographical map and precipitation records for Fargo. Respondent's Prehearing Exchange Exhibits (R's Ex.) 8, 20. It is apparent from Complainant's photographs (C's Ex. 1) that the land in the area is very flat. Respondent presents aerial photographs of the site. (R's Ex. 9). The parties each cite to photographs in their proposed exhibits and dispute whether Respondent's on-site storm sewer inlets would redirect drainage flow to the street. Motion at 11; Opposition at 9. However, it is not clearly apparent from viewing the photographs, Respondent's topographical map and Respondent's precipitation data that no stormwater discharge occurred from the facility during the relevant period. Because contradictory inferences can be drawn from the proposed evidence, and the evidence must be viewed in light most favorable to Respondent, it is not prudent to grant accelerated decision on Count 1.

VI. **Liability for Count 2**

Count 2 alleges that after Respondent obtained the general North Dakota NPDES permit, it failed to conduct storm water inspections at the frequency required by the permit, and/or to maintain inspection records on-site. It alleges a violation of a condition of the permit. It appears that this condition implements Section 308(a) of the CWA, 33 U.S.C. Section 1318, which provides in pertinent part, that ". . . the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records . . . [and] (iii) . . . use . . . such monitoring equipment or methods . . . ." CWA Section 309(g) in turn provides, in pertinent part, "Whenever on the basis of any information available . . . the Administrator finds that any person has violated Section 1311 . . . [or] 1318. . . or has violated any permit condition or limitation implementing any of such sections in a permit issued under Section 1342 of this title . . . the Administrator . . . may . . . assess a . . . class II civil penalty . . . ." The plain language of the statute indicates that a violation of a Section 402 permit condition that implements Section 308 of the CWA constitutes a violation of the CWA Section 309(g) regardless of whether a discharge has occurred.

The parties do not dispute that Respondent failed to conduct stormwater inspections at the weekly frequency required by the permit, and that Respondent failed to record and/or maintain site inspection records on-site. Stip ¶¶ 31, 33. The parties do not dispute that these were conditions of the NDPDES permit. Stip ¶¶ 30, 32. Respondent has not raised any issues of fact that are material to Count 2. Accordingly, Complainant has demonstrated that there are no genuine issues of material fact, and it is entitled to judgment as a matter of law, as to liability on Count 2.

V. **Whether to Grant Accelerated Decision as to the Penalty for Count 2**

Complainant has requested accelerated decision on the total proposed penalty of $80,000. Because accelerated decision was denied on Count 1, the only issue is whether to grant

accelerated decision on a penalty for Count 2. The CWA sets forth the following factors to consider in assessing a penalty: the nature, extent and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violations, degree of culpability, any economic benefit or savings gained from the violation, and such other factors as justice may require. CWA Section 309(g)(3). Respondent asserts that the proposed penalty of $80,000 is "draconian." Respondent's Prehearing Exchange at 11, 24. Complainant calculated separate penalty figures for avoided costs and delayed costs, considering the facts of each count, for the factor of "economic benefit." Affidavit of Melanie Pallman, attached to Motion; C's Ex. 23. However, Complainant has not pointed to any separate calculation of the total proposed penalties for Count 1 and for Count 2, so there is no way of knowing which portion of the total $80,000 penalty is proposed for Count 2. Issues material to the amount of penalty for Count 2 remain in dispute. Therefore, an accelerated decision must be denied as to a penalty for Count 2.

ORDER

1. Complainant's Motion for Accelerated Decision on Liability as to Count 1 is **DENIED.**

2. Complainant's Motion for Accelerated Decision on Liability as to Count 2 is **GRANTED.** Accordingly, Respondent is liable for the violations alleged in Count 2 of the Complaint.

3. Complainant's Motion for Accelerated Decision on Penalties is **DENIED**. The issues remaining in this matter are as to liability for Count 1, the amount of any penalty to assess for Count 2, and, if Respondent is found liable for Count 1, any penalty to assess for Count 1.

4. The parties shall continue in good faith to negotiate a settlement of this matter. Complainant shall file a status report as to the progress of settlement negotiations on **March 30, 2006.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: March 7, 2006
Washington, D.C.